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IN THE

Supreme Court of the United States

October Term, 1959.

No. 111.

MAX SCHAFFER and NORMAN SCHAFFER,
Petitioners,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

Petitioners' Reply Memorandum.

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PETITIONERS' REPLY MEMORANDUM.

The nature of the arguments advanced in the Government's Brief in Opposition justify and indeed require a few words in reply.

First. These petitioners did not ask for a severance in advance of trial (2a; see *United States v. Stracuzza*, 158 F. Supp. 522, 524 (S. D. N. Y.)), nor have they ever contended that denial of their co-defendant's motion to sever was error while the conspiracy counts remained in the case.[1]

1. The government, in a footnote, (U. S. Br. 6) implies that no mention of the effect of the misjoinder was called to the attention of the trial court except by a pre-trial motion for severance and a motion to dismiss. This is clearly incorrect. Despite objections that it would be prejudicial to the petitioners to continue the trial on the substantive grounds only (13a-14a) the trial court ordered the case to go forward. The reliance of the government on *Kleven v. United States*,

Their position, simply stated, is that when the conspiracy counts were dismissed, there remained only three separate and unrelated accusations [2] against three separate sets of defendants, which as a matter of law could not simultaneously be considered by a single jury.

The Government cites no case authorizing such a mass trial of unrelated defendants, nor did the Court of Appeals (Pet. App. A11-A12); as we have shown (Pet. 11-12), the decisions relied on by the court below all involved either conspiracy counts that went to the jury or else some connection between the several accused at that juncture. In all of the Court of Appeals' authorities, there was a proper basis for joinder when the case went to the jury; here there was not.

The Court of Appeals said (Pet. App. A9), "Were it not for the conspiracy count, it would have been clearly erroneous to try the appellants together under Rule 8(b), Fed. R. Crim. P." Petitioners submit that, when the trial judge dismissed the conspiracy count, it was clearly erroneous to submit to the jury the cases of the petitioners together.

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240 F. 2d 270 (C. A. 8) is misplaced. There, the defendants Klevens and Mantzold *jointly* participated "in the same series of acts or transactions constituting an offense or offenses" by receiving, concealing, buying and facilitating the importation of merchandise illegally imported.

2. The government incorrectly argues (U. S. Br. 6) that petitioners stated that, "the conspiracy count was included in the indictment as a stratagem for the purpose of permitting an improper joinder." We repeat, with emphasis, what we stated in our petition (Pet. 11): "The question comes down to whether the government *can claim the benefit* of improper joinder by the single stratagem of bracketing them with a conspiracy *so flimsy* that it fell far short of even getting to a jury." Neither the District Judge nor the Court of Appeals could find any evidence justifying the conspiracy count. The District Judge practically dismissed the conspiracy count on his own motion (11a-12a) declaring that the government had failed to "come anywheres close to the standard" of proof. The Court of Appeals in its opinion (Pet. App. A11) likewise stated: "and there is nothing in the record to indicate that any one of them knew of Stracuzza's dealings with the others."

No ruling of which we are aware justified that action, and this Court's decisions in *McElroy v. United States*, 164 U. S. 76, 81, and in *Kotteakos v. United States*, 328 U. S. 750, 772-774, are clear authority against it.

The Government defends the original inclusion of the conspiracy count in the indictment stating: "Since there was some evidence that the *petitioners knew each other*, the United States Attorney could well have believed that *all the petitioners* were part of a general scheme to deal in stolen goods" (U. S. Br. 6). [Emphasis supplied.] The Government is mistaken. There is no evidence that Schaffers knew Marco or that Marco knew Karp. And the only evidence that Schaffers "knew" Karp was an introduction. Not only does the Government have no standing to question the dismissal of the conspiracy count, it has no evidence to show that such dismissal was erroneous.

Second. In *Grunewald v. United States*, 352 U. S. 391, reversing the Second Circuit, this Court held that a conviction could not be sustained on appeal on a factual theory never submitted to or passed upon by the jury. But the present case presents an *a fortiori* situation, because here the basis for affirmance set forth in the opinion below (Pet. App. A7), that the evidence was sufficient to set forth a common plan giving the several shipments unity for purposes of the statute, was not alleged in the indictment; was not litigated at the trial (Tr. 765-766); and was not only not submitted to the jury but petitioners' specific requests that it be so submitted (Tr. 1611-1612, 1617-1618) were refused by the trial judge.[3]

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3. For the convenience of the Court those requests are set forth here:

(a) *Request on Behalf of Max Schaffer* (Tr. 1611-1612).

"9. No violation of Section 2314 takes place unless the Government establishes beyond a reasonable doubt that the Defendant, Max Schaffer, transported or caused to be transported merchandise of a value of Five Thousand Dollars ($5,000),

In *Grunewald*, this Court reversed the Second Circuit's affirmance of a conviction because, "under the judge's charge, the convictions * * * might have rested on an impermissible ground" 353 U. S. 412. Here, however, the Second Circuit has affirmed convictions on a ground that was not only never submitted to the jury, but which was advisedly not so submitted despite a specific request for such submission made by these petitioners.

We argued this point at some length in our petition (Pet. 2 [Question 2], 9 [Second], 15-17). But the Government's only reply thereto is silence.

Third. Finally, petitioners raise the question whether, in the absence of a common plan—and on this record there was none, because the conspiracy count was dismissed, and the question of a plan *vel non* was never submitted to the jury—it is proper to aggregate [4] the value of separate ship-

knowing the same to have been stolen and converted. If the Jury finds that the shipments from on or about May 15, 1953 up to and including July 27, 1953, from the Southern District of New York to Lebanon, Pennsylvania, were entirely separate and distinct and were not in fact transported or caused to be transported by Max Schaffer, pursuant to a single plan or agreement with A. Schafler [Anthony Stracuzza's trade name], such shipments cannot be grouped for the purpose of establishing the value of Five Thousand Dollars ($5,000) as required by the statute and must find the Defendant, Max Schaffer, not guilty. *Andrews v. United States*, 108 F. 2d 511 at page 514.

"10. In order to group the shipments between on or about May 15, 1953, up to and including July 27, 1953, the Jury would have to find beyond a reasonable doubt that the shipments were transported pursuant to a single plan or agreement between Max Schaffer and A. Schafler and thus had unity of purpose. *Andrews v. United States*, 108 F. 2d 511 at page 514."

(b) Requests 8 and 9 on behalf of Norman Schaffer (Tr. 1617-1618) were, except for the difference in numbering and the difference in the name of the defendant concerned, identical with the requests on behalf of Max Schaffer which have just been quoted.

4. The curious feature of this prosecution is that the actual dealers in the stolen goods—the "fences"—completely escaped punishment: Anthony and Mario Stracuzza were given suspended sentences (69a), and the case against Dorothy Stracuzza was *nolle prossed* (4a). Yet the purpose of the legislation was "to protect interstate

ments under the National Property Act, 18 U. S. C. §§ 2314, 2311.

Up to now, the existence of a common plan has been deemed a prerequisite to any such aggregation, see *Andrews v. United States*, 108 F. 2d 511, 514 (C. A. 4); *Cartwright v. United States*, 146 F. 2d 133, 135 (C. A. 5), and the court below apparently agrees, because it spelled out a plan from the evidence although that issue was not submitted to the jury, and because it went on to say (Pet. App. A7), "We do not now decide what ruling should be made in a case where the transactions are truly 'separate and distinct.'"

On this issue the Government (U. S. Br. 7-10) either relies on the assertion that an agreement existed—although that issue was withheld from the jury—or else quotes legislative history. But the Government pointedly avoids discussing the authorities just cited, and equally pointedly avoids facing up to the heart of the problem of aggregating value in the absence of a plan: Where there is no plan, the first shipments with a value below the statutory limit are not criminal, but on the Government's theory they would become criminal retroactively by having added to them the value of the later shipments.

While petitioners believe that reversal is required under their first two points, the problem of the third one will arise if there is a retrial. It is moreover a recurring question and an obviously important one in the administration of the National Stolen Property Act.

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commerce by going after the 'fence'." H. R. Rep. 1599, 73d Cong., 2d sess., p. 3. See also H. R. Rep. 2528, 70th Cong., 2d sess., at 2: "Of the many problems that confront those interested in the administration of criminal law, one of the most difficult to deal with has been the prosecution of the professional receiver and dealer in stolen, embezzled, or fraudulently obtained merchandise, who is usually known as the 'fence.' * * * To strike at the 'fence' * * * is striking at the very root of the evil."

This legislation was obviously not aimed at "purchasers" from the "fence." The usual strict rule in reading criminal statutes here forbids an interpretation that separate and distinct transportations by the purchasers of the "fence" are such "series of violations" that may be aggregated.

CONCLUSION.

For the foregoing additional reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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